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No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1960

ARTHUR M. MCPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 76–81) is reported at 272 F. 2d 627.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1959 (R. 75), and a petition for rehearing was denied on January 4, 1960 (R. 84). The petition for a writ of certiorari was filed on February 3, 1960, and was granted on March 21, 1960 (R. 85). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established a prima facie case of wilful refusal to produce records before a Congressional Committee, in violation of 2 U.S.C. 192, by showing (a) that the Committee had a reasonable basis for believing that petitioner could produce the records, and (b) that petitioner offered no explanation or justification to the Committee for his refusal to produce, but merely stated "I will not" do so.

2. Whether petitioner's failure to raise before the Committee the contentions that (a) the subpoena was so broad as to constitute an unreasonable search and seizure, and (b) the subpoenaed documents were not pertinent to the Committee's inquiry, precluded him from raising those issues as defenses in his contempt trial.

3. If question 2 is answered negatively,

(a) whether the subpoena was unduly broad, and

(b) whether the evidence supports the district court's conclusion that the subpoenaed documents were pertinent to the inquiry.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 provides:

> Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to

> answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

The authority of the House Un-American Activities Committee is contained in H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

STATEMENT

Petitioner was convicted by a jury of wilfully failing and refusing to produce, pursuant to subpoena, records of the Civil Rights Congress before the House Un-American Activities Committee in violation of 2 U.S.C. 192 (R. 4, 72, 73). He was sentenced to nine-months' imprisonment and fined $500.00 (R. 73). The court of appeals unanimously affirmed (R. 76–81).

1. *The proceedings before the Committee.*

On February 13, 1952, petitioner was subpoenaed by the House of Representatives to appear before the

House Un-American Activities Committee in Detroit, Michigan, on February 26, 1952,

> together with all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress * * *.

and to "testify touching matters of inquiry committed to said Committee" (R. 6).

Prior to the issuance of the subpoena, the Committee knew that the "Civil Rights Congress * * * had been declared a subversive organization by the Attorney General" (R. 17), and the Committee itself had already also so found (R. 22). The "enunciated purpose" of the Detroit hearings "was to determine the extent of Communist activity in the area. Therefore, the committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation" (R. 22). Petitioner was subpoenaed to produre the records because the Committee "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (R. 21, 17).[1]

At the opening of the hearing before a subcommittee in Detroit, the Chairman (Congressman Wood)

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[1] A letterhead of the Civil Rights Congress of the State of Michigan, contained in the Committee's official files (R. 45), listed "Arthur McPhaul" as the executive secretary (R. 48–49, 17). The trial court admitted the letterhead in evidence for its consideration as bearing on the issue of the pertinency of the subpoenaed records to the Subcommittee's inquiry (R. 50–51). However, the court sustained a defense objection to its admission "as evidence before the jury," apparently because there was no showing that the "Arthur McPhaul" there listed was the petitioner (R. 48–50).

explained the purpose of the hearing (R. 24-27). He stated (R. 25-26) that investigations in the City of Baltimore, the State of Massachusetts, "and other places has disclosed a concentration of Communist effort in certain defense areas of the country"; that during the Massachusetts hearings one of the witnesses had "detailed the method" by which the Massachusetts Communist Party "used its members employed in industry to keep the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities in that area"; that there was "no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit"; and that

> The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof.

Petitioner, who was accompanied by counsel, appeared before the Subcommittee on February 27, 1952 (R. 30-31). The following colloquy then occurred (R. 31):

> Mr. WOOD: Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and documents. Are you prepared to respond to that subpoena?
>
> * * * * * *
>
> Mr. WOOD: * * * Will you answer my question, Mr. McPhaul. Are you prepared to produce the documents and papers that have been

called upon for you to produce under the subpoena?

Mr. McPHAUL: Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment of the Constitution.

* * * * *

Mr. TAVENNER [Committee counsel]: I would like to ask the witness if he has any other reason for refusing to produce the documents called for in the subpoena?

Mr. McPHAUL: I think my answer covers it.

* * * * *

Petitioner was then sworn (R. 32). After he had handed the Subcommittee copies of a prepared statement and a petition (R. 32–33), and he had answered preliminary questions, he was asked (R. 34):

Mr. TAVENNER: The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?

Mr. McPHAUL: My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.

Mr. TAVENNER: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?

Mr. McPHAUL: I have answered it in this statement.

> Mr. TAVENNER: No, sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> Mr. MCPHAUL: I will not.

The House of Representatives certified the matter to the United States Attorney for contempt proceedings (R. 38, 39, 41–44). Petitioner was indicted on July 29, 1954 (R. 4), and the court denied a defense motion to dismiss the indictment (R. 5, 55).

2. *The trial proceedings.*

At the trial, the Government called as a witness Senator Potter, who had formerly been a member of the House Un-American Activities Committee and had been present during petitioner's appearance before the Subcommittee (R. 8). Senator Potter explained the purposes of the hearing and why petitioner had been subpoenaed (see *supra*, p. 4), and identified various documents (R. 35–46). The Government introduced in evidence portions of the transcript of the hearing (which Senator Potter read to the jury) (R. 31–34, 35),[2] and pertinent papers in the contempt citation (R. 30). Petitioner offered no evidence.

The court refused to charge the jury, as requested by petitioner, that the government must prove the existence of the subpoenaed records and that they were in petitioner's custody or control (R. 62, 70–72).

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[2] The complete transcript of petitioner's appearance before the Subcommittee is printed in Hearings Before the House Committee on Un-American Activities on *Communism in the Detroit Area*, 82d Cong., 2d Sess., Part 1, pp. 2870–2876.

Instead, the court charged (R. 67) that if the jury found beyond a reasonable doubt that petitioner

> appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control,

the jury

> may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.

The court further charged (*ibid.*) that petitioner was not excused from compliance with the subpoena merely because it did not designate him as an officer or agent of the Civil Rights Congress, or because of lack of proof of any connection between him and that organization.

The court instructed the jury that, in order to convict, it had to find (1) that petitioner had been summoned to produce certain records of the Civil Rights Congress before the Subcommittee, (2) that he had appeared before the Subcommittee, and (3) that he "wilfully fail[ed] or wilfully refuse[d] to produce the records designated in the subpoena * * *" (R. 68).

SUMMARY OF ARGUMENT

I

A. When the House Un-American Activities Subcommittee subpoenaed petitioner to produce certain designated records of the Civil Rights Congress, it "had information that Mr. McPhaul was executive director or executive secretary of" that organization (R. 21, 17). As such, he was clearly an appropriate official to call upon to produce its records, and the Subcommittee was reasonably justified in assuming, when petitioner appeared before it, that he could have done so.

Petitioner, however, offered no justification to the Subcommittee for his refusal to produce. Although he claimed his privilege against self-incrimination with respect to "any questions which deal with possession or custody" of the subpoenaed records (R. 34), this claim did not justify his refusal to produce the records of the organization. *United States* v. *White*, 322 U.S. 694, 699; *Rogers* v. *United States*, 340 U.S. 367, 372. Moreover, petitioner did not base his refusal to produce upon any claim of privilege; he merely stated, in response to the question whether he would produce the records, "I will not" (R. 34).

If, in fact, petitioner could not have produced the records, a simple statement to that effect could not have incriminated him. He cannot justify his refusal to make such a statement on the ground that he would then have been required to explain his non-possession. For he could properly claim his privilege with respect to any of such questions that might tend

to incriminate him. *Curcio* v. *United States*, 354 U.S. 118.

B. *United States* v. *Bryan*, 339 U.S. 323, fully supports the government's position that in these circumstances petitioner's unexplained refusal to produce the subpoenaed document constituted a prima facie "wilful" refusal to comply with the subpoena, in violation of 2 U.S. 192. In *Bryan*, in upholding a criminal contempt conviction for wilfully failing to produce records before a Congressional Committee, this Court held that the witness's failure to question the presence of a quorum when appearing before the Committee precluded her from raising the issue for the first time as a defense in her contempt trial. The Court stated (pp. 331–333) that if the witness "had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives * * * would have required that she state her reasons for noncompliance upon the return of the writ"; that "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes"; and that "[i]f, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena." The fact that in the *Bryan* case the witness's connection with the organization and her control of the records were admitted does not weaken the applicability of its reasoning to the instant case. See, also, *United States* v. *Fleischman*, 339 U.S. 349, 360, 364.

C. When the government proved at the trial (1) that the Subcommittee had a reasonable basis for believing that petitioner could produce the records and (2) that he failed to offer any explanation or excuse to the Subcommittee for his refusal to do so, this established a prima facie case of wilful refusal to produce, and shifted the burden to petitioner to present some evidence to explain or justify the refusal. *United States* v. *Fleischman*, 339 U.S. 349, 364. When petitioner elected at the trial not to do so, he in effect removed that issue from the case. The judge, therefore, was justified in instructing the jury that it need not consider that issue.

Since "the relevant facts are peculiarly within [petitioner's] knowledge" (*United States* v. *Fleischman*, 339 U.S. at 363), and since "the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as [he] was able" (*id.* at 362), this case is an appropriate one for applying the settled principle of criminal law that where "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation" (*Morrison* v. *California*, 291 U.S. 82, 88–89), the burden of proof may be placed upon him to do so. Since petitioner failed to produce any evidence to justify his refusal to produce, the court was warranted in submitting the case to the jury, and the jury in convicting, upon the prima facie evidence of wilful refusal that the government introduced.

II

Petitioner also attacks his contempt conviction on the ground that the subpoena was unduly broad and that the evidence did not support the trial court's ruling that the subpoenaed materials were pertinent to the inquiry. Although we believe that these contentions are without merit, we think they are further subject to the threshold objection that petitioner's failure to raise them before the Subcommittee precluded him from urging them as a defense in his contempt trial.

The considerations relied upon in *United States* v. *Bryan, supra*, for holding that the witness's failure to urge before the Committee the absence of a quorum precluded her from raising that issue in her contempt trial, are equally applicable to the defenses that petitioner here sought to raise for the first time at his trial. For if petitioner believed that the alleged undue breadth of the subpoena and non-pertinency of the subpoenaed records were "legitimate reasons for failing to produce the records" (339 U.S. at 332), he was obligated so to advise the Subcommittee, and to give it an opportunity to correct the defects. Were the subpoena unduly broad, its scope could have been appropriately modified. Similarly, if petitioner had challenged the pertinency of materials sought, the Subcommittee could have explained their relevancy to him or, if some of the subpoenaed materials were shown to be unrelated to the inquiry, they could have been excluded.

III

A. The subpoena directed petitioner to produce "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) "the organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by" it (R. 6). We submit that this demand was not unduly broad.

"[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209). Since the Subcommittee's inquiry here was relatively broad, the permissible scope of materials that could be sought was also broad. Because the Subcommittee could not know precisely what books and records were kept by the Civil Rights Congress, the subpoena necessarily could only "specif[y] * * * with reasonable particularity, the subject to which the documents * * * relate" (*Brown* v. *United States*, 276 U.S. 134, 143). The subpoena here is no more sweeping than several that this Court has upheld.

B. The purposes of the Subcommittee's investigation were to determine whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26). At previous hearings, the Committee had received information about a concentration of Communist effort in certain defense areas, and that Party members employed in industry were used to keep the Communist Party advised of industrial

potentiality in those areas. The Committee also had reason to believe that the Civil Rights Congress was a subversive organization.

We submit that this evidence warranted the trial court's ruling that the subpoenaed records of the Civil Rights Congress "were pertinent to the particular investigation" (R. 57). The circumstances and auspices under which the Civil Rights Congress was organized, the identity and terms of affiliation with other organizations, and the sources of its funds and to whom they were distributed, were all highly significant in determining whether the organization was being used by the Communists in the Detroit area. Thus, the documents were not "plainly incompetent or irrelevant to any lawful purpose of the [Subcommittee] in the discharge of [its] duties" (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509), but, on the contrary, were "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209).

ARGUMENT

INTRODUCTION

The principal issue in this case is whether petitioner's conviction by a jury for "willfully" refusing to produce records before a Congressional Committee, in violation of 2 U.S.C. 192, is invalid because (1) the government introduced no evidence that the subpoenaed records were in existence and that petitioner had possession or control thereof, and (2) the trial court refused to submit these two issues to the jury. As this Court has pointed out, 2 U.S.C. 192 requires

"proof beyond a reasonable doubt that the refusal of the witness was deliberate and intentional" (*Flaxer* v. *United States*, 358 U.S. 147, 151; *Quinn* v. *United States*, 349 U.S. 155, 165). This does not mean, however, that such refusal need "necessarily be for an evil or a bad purpose"; it is enough that the refusal was "deliberate and intentional" in the sense that it was not "a mere inadvertence or an accident" (*Fields* v. *United States*, 164 F. 2d 97, 100 (C.A. D.C.), certiorari denied, 332 U.S. 851).

The government's proof in this case showed (1) that the Committee had a reasonable basis for believing that petitioner could produce the records of the Civil Rights Congress, and (2) that petitioner offered no excuse, justification, or explanation to the Subcommittee for his refusal to do so—he merely stated categorically that "I will not" produce them (R. 34). We shall show that this evidence established a prima facie case of willful refusal to produce under 2 U.S.C. 192, and shifted the burden to the defendant to come forward at the trial with evidence that he could not have complied, *i.e.*, either that the documents were not in existence, or that they were not in his custody or control. Since petitioner presented no such evidence, the district court was fully warranted in declining to submit those issues to the jury.

Petitioner challenges his conviction on two other grounds. He contends that the subpoena was so broad as to constitute an unreasonable search and seizure, and that the evidence was insufficient to show that the subpoenaed records were pertinent to the Subcommittee's inquiry. Petitioner, however, raised

neither of these issues before the Subcommittee, and under settled principles his failure to do so precluded him from raising them for the first time as a defense in his contempt trial. We shall further show that in any event the subpoena was not unduly broad and the documents subpoenaed were pertinent to the inquiry.

I

THE GOVERNMENT ESTABLISHES A PRIMA FACIE CASE OF WILFUL REFUSAL TO PRODUCE SUBPOENAED DOCUMENTS BEFORE A CONGRESSIONAL COMMITTEE IN VIOLATION OF 2 U.S.C. 192 BY SHOWING (1) THAT THE COMMITTEE HAD A REASONABLE BASIS FOR BELIEVING THAT THE WITNESS COULD PRODUCE THE DOCUMENTS AND (2) THAT THE WITNESS OFFERED NO EXPLANATION OR JUSTIFICATION TO THE COMMITTEE FOR HIS REFUSAL TO DO SO. IN THE ABSENCE OF ANY CLAIM OR SHOWING BY THE WITNESS AT THE TRIAL THAT HE COULD NOT HAVE PRODUCED THE DOCUMENTS, THE GOVERNMENT IS NOT REQUIRED TO ESTABLISH THAT, OR THE JURY TO CONSIDER WHETHER, HE COULD HAVE DONE SO

A. When the Committee subpoenaed petitioner to produce certain designated records of the Civil Rights Congress, it "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (R. 21, 17; see the Statement, *supra*, p. 4). As such, he was clearly an appropriate official to call upon to produce the records of the organization (cf. *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916), and the Committee therefore had reasonable grounds for believing that he could produce them. The fact that the subpoena did not describe petitioner as an official

of the Civil Rights Congress is immaterial. Since it called upon him to produce records of that organization, it was obviously directed to him in his official capacity. If petitioner, in fact, was not an official of, or connected with, the organization, he could have so informed the Committee; and if, because of such nonaffiliation he would not have produced the records, he would, of course, have had a complete excuse for noncompliance (see *infra*, pp. 21–22).

Thus, when petitioner appeared before the Subcommittee, the latter was reasonably justified in assuming that he could have produced the records of the Civil Rights Congress. In his appearance, petitioner did nothing to contradict that conclusion. He never stated—or even suggested—that he was not connected with the Civil Rights Congress, that the subpoenaed records were not in existence, or that he could not produce them. Such claims, if established, would of course have excused nonproduction. *United States v. Bryan*, 339 U.S. 323, 330. Had petitioner made such a showing, the Subcommittee could then have taken whatever further steps might have been appropriate for obtaining the documents, such as subpoenaing them from someone else. The inquiry, in that event, might not have been blocked.

Petitioner offered no justification for his refusal to produce. While he claimed his privilege against self-incrimination with respect to "any questions which deal with possession or custody" of the subpoenaed records (R. 34), he did not base his refusal to produce upon any claim of privilege. He merely stated, in response to the question whether he would

produce them, but without explanation: "I will not." Of course, petitioner could not have based his refusal to produce upon a claim of self-incrimination. For it is well settled that "books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally." *United States* v. *White*, 322 U.S. 694, 699 (1944)." (*Rogers* v. *United States*, 340 U.S. 367, 372; see *Curcio* v. *United States*, 354 U.S. 118, 122–123).

Petitioner argues (Br. 16–17), however, that a mere statement that he could not produce might have incriminated him. He suggests (Br. 17) that the "alleged member-witness could hardly explain the existence or non-existence, his control or non-control, of the organization's records, without also being required to explain his relationship to the organization and testify as to his knowledge of its records * * *." But if petitioner could not have produced, he was not required to "explain" why, but merely to have stated the fact. His simple statement that he did not have custody or control of the subpoenaed records could not have incriminated him, and would have given the Committee an opportunity to refute his claim or to take other steps to obtain the records.[3]

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[3] Petitioner argues (Br. 14–16) that only the House of Representatives itself, and not the Subcommittee, could decide the questions of existence and possession of the records; and that he was, therefore, not required to raise the point before the Subcommittee. But the Subcommittee represented the House and had the powers of the House to compel production (see

Of course, petitioner could properly claim his privilege as to any additional questions relating to "his relationship to the organization and * * * his knowledge of its records" that might tend to incriminate him: *Curcio* v. *United States*, 354 U.S. 118; *Traub* v. *United States*, 232 F. 2d 43, 48 (C.A.D.C.). But there is a fundamental distinction between answering such questions and merely advising the Committee that he could not produce. The latter statement would relate solely to the simple fact whether petitioner could comply, and by stating that he could not he would not be "opening the door" to further questions as to the location and existence of the records. Cf. *Rogers* v. *United States*, 340 U.S. 367, 374. Petitioner could be incriminated only if he supplied answers to the latter questions, and it is only with respect to such questions, therefore, that his claim of privilege could properly be made. He cannot, however, justify a refusal to state that he could not have produced the records—if that were the fact—on the ground that the Subcommittee might thereafter have asked him further questions that would have been incriminating.

Watkins v. *United States*, 354 U.S. 178, 200–201), and it could therefore pass upon all questions that directly related to that power. A Congressional Committee has been held to have authority to rule on such issues as the privilege of a witness not to answer (*Bevan* v. *Krieger*, 289 U.S. 459), the presence or absence of a quorum (*United States* v. *Bryan*, 339 U.S. 323), and the pertinency of the questions asked (*Barenblatt* v. *United States*, 360 U.S. 109). There is no reason why it should not also pass upon the existence or possession of documents.

B. Petitioner's unexplained refusal to produce the documents, not justified by his claim of privilege with respect to answering questions about his "possession and control" of them, is thus comparable to the "sweeping statement" of the witness in *Bevan* v. *Krieger*, 289 U.S. 459, 465, "that he would answer no further questions." This Court there held (*ibid.*) that "[s]uch an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt." Similarly, in the instant case, petitioner's "attitude" toward the Committee—reflected in his statement, without explanation, that "I will not" produce the documents—"indicates no desire" to aid the Committee in carrying out its investigatory function by explaining why he would not comply, and thus giving the Committee an opportunity to take appropriate steps to obtain the records from other sources. Rather, it was an obvious flouting of the Committee's authority. As such, it constitutes a prima facie "wilful" refusal to comply with the subpoena, in violation of 2 U.S. 192.

United States v. *Bryan*, 339 U.S. 323, fully supports this conclusion. There, this Court held that, in a prosecution under 2 U.S.C. 192 for wilfully failing to produce records subpoenaed by the House Un-American Activities Committee, the failure of a witness to question the presence of a quorum when appearing before the Committee precluded her from raising the issue for the first time as a defense in her contempt trial. Citing *Bevan* v. *Krieger, supra*, the Court stated (p. 333) that "[t]o deny the Committee the opportunity to consider the objection or remedy

it is in itself a contempt of its authority and an obstruction of its processes." The Court pointed out (pp. 331–332) that a "subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase"; that "persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery"; that if the witness "had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ"; and that "[i]f, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena."

The Court also posed the following hypothetical question (p. 333):

> * * * Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason. May he defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers? We think such a condition hardly tenable. Yet, at the return date, compliance with the subpoena was "impossible" just as in the present case. * * *

The same reasoning applies to this case. Lack of "sufficient time to gather the papers" is just as valid an excuse for non-production as lack of control or possession of the documents. If it would be "hardly tenable" to "defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers," it would similarly be "hardly tenable" for the witness to defend on the ground that he did not have possession or control. Indeed, this is an even stronger case for holding against the defendant than the hypothetical case posed in *Bryan*. For here, unlike *Bryan*, petitioner has never contended—and does not to this day contend—that he could not have produced the subpoenaed records. His sole argument is that, although he concededly "fail[ed] to deliver [the subpoenaed records] as required but refuse[d] to give any reason," he could not be found to have "wilfully" failed to do so unless the government proved that he could have produced them. Thus, there is not even in this case the question whether petitioner's failure to raise before the Subcommittee his inability to comply would have precluded him from raising that issue at his trial—the issue considered in *Bryan*. For here petitioner has never suggested that he could not have complied.[4]

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[4] The fact that here petitioner has never contended that he could not have complied with the subpoena is one ground distinguishing this case from *Nilva* v. *United States*, 352 U.S. 385, *United States* v. *Patterson*, 219 F. 2d 659 (C.A. 2), and *Traub* v. *United States*, 232 F. 2d 43 (C.A. D.C.), upon which petitioner relies (Br. 9–11, 17–18). In each of those three cases, the defendant vigorously contended either that he had endeavored to

Similarly, in *United States* v. *Fleischman*, 339 U.S. 349, 364, in upholding a conviction for wilful refusal to produce subpoenaed records before the same Subcommittee, the Court again stressed that the burden of proving inability to comply rested on the witness. There the witness was a member of the executive board of the same organization involved in the *Bryan*

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comply with the subpoena in good faith, or that he could not have produced the subpoenaed documents.

1. In *Nilva*, which involved non-compliance with a court subpoena addressed to a corporation, the defendant (the company's Vice President) had produced a number of the subpoenaed items. He attempted to excuse his nonproduction of the remaining items on the ground that since someone else was "the sole custodian" of those records, he was required to produce "only what he in good faith was able to find" (Brief for Petitioner, No. 37, O.T. 1956, p. 49). This Court, noting that when Nilva "appeared in court in response to the subpoenas, he did not claim either want of actual possession of the required records or lack of opportunity or authority to produce them" (352 U.S. at 394), held (p. 395) that "the trial court had a sufficient basis for concluding that petitioner intentionally, and without 'adequate excuse,' defied the court," and that "the record sustains petitioner's conviction for criminal contempt * * *."

2. Patterson had previously been convicted of contempt for failure to produce records of the Civil Rights Congress which were then in his control as executive secretary. After his release from prison, the grand jury subpoenaed him to produce the same (plus other) records. He contended, however, that the records were no longer in his possession (219 F. 2d at 660–661). He was convicted of contempt, primarily on the theory of "a presumption of continued possession and existence [that was] held sufficient to constitute a prima facie case for the government" (219 F. 2d at 661). A divided court reversed the conviction, holding that "several significant facts" shown by the record "make continued existence and possession of the 1952 and 1953 records on the whole unlikely" (*ibid.*).

3. Traub's conviction of criminal contempt, insofar as it was based upon a refusal to produce documents pursuant to a grand

case; all members were subpoenaed to produce the records. Each refused to do so, on the ground that the secretary (Mrs. Bryan) rather than the board had custody of the records, and that no member individually could compel Mrs. Bryan to produce them. In holding that Mrs. Fleischman had wilfully refused to produce, this Court ruled that the government was not required to "negative each" possible excuse for non-compliance that the witness might have had, but that "the burden [was] on respondent to advance them as defense matter" (p. 360). It stated (p. 364, emphasis added) that even assuming, "contrary to the reasonable inferences to be drawn from respondent's statements before the Committee, that she may have made some effort to bring about compliance with the subpoena, *or had some excuse for failing to do so,* we think that under the circumstances here presented *the burden was upon her to present evidence to sustain such a defense.* And, in the absence of such evidence, we conclude that the evidence adduced by the Government amply sustains the conviction." Cf. also, *Nilva* v. *United States,* 352 U.S. 385, 394–395, discussed *supra,* n. 4, p. 23.

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jury subpoena, was reversed because (1) the trial court had not made it clear which documents Traub was directed to produce and (2) Traub "testified before the grand jury that he had produced all the documents designated in item 3 of the subpoena that were in his possession and control when the subpoena was served upon him" (232 F. 2d at 47). The court ruled (*ibid.*) that, since such testimony had not been refuted, it "must be accepted as establishing compliance with the subpoena."

In the instant case, however, as we have shown in the text, petitioner made no attempt either to comply with the subpoena, or to offer any justification for his refusal to do so.

It is true, as petitioner points out (Br. 13–14), that in *Bryan* the witness' connection with the organization and her control of the records were admitted (339 U.S. at 324). But those facts do not weaken the applicability of the reasoning in *Bryan* to the instant case. For in a case such as this, where the Committee had a reasonable basis for believing that petitioner could have produced the records, and petitioner offered no explanation for his refusal to do so and did not claim inability to produce, a subsequent attempt "to excuse a default on grounds of inability to comply with the subpoena * * * must fail in the absence of even a modicum of good faith in responding to the subpoena." (*Bryan, supra*, 339 U.S. at 332). And, as *Bryan* makes clear (*ibid.*), if the witness "had legitimate reasons for failing to produce the records * * * [it was] required that [he] state [the] reasons for noncompliance upon the return of the writ."

C. The government's proof here established a prima facie case of wilful refusal to produce because, in view of the Subcommittee's reasonable basis for believing that petitioner could produce and his failure to offer any excuse to the Committee for his refusal to do so, it was a reasonable inference that he could have done so. The burden was then shifted to petitioner to present some evidence to explain or justify his refusal. *United States* v. *Fleischman*, 339 U.S. 349, 364. When petitioner elected at the trial not to do so, he in effect removed that issue from the case. In these circumstances, the judge was fully justified in instructing the jury that it need not consider that

issue,[5] but only (1) whether petitioner was summoned to appear before the Subcommittee, (2) whether he did so, and (3) whether he "wilfully fail[ed] or refuse[d] to produce the records designated in the subpoena * * *" (R. 68). As we have shown, the evidence fully justifies the jury's verdict that petitioner's refusal to produce was in fact "wilful."

The principle, applied in *Bryan*, that the subpoenaed witness has the burden of promptly presenting any justification for non-compliance to the tribunal that issued the subpoena, is well settled. Many years ago, in language that is particularly pertinent to the instant case, the doctrine was stated as follows (*London Guarantee & Accident Co., Ltd.* v. *Doyle & Doak*, 134 Fed. 125, 128 (C.C. E.D. Penn.)):

> It cannot be doubted, I think, that the burden of proof was upon them. The court's order of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply.

[5] Contrary to petitioner's contention (Br. 19–20), the court's instruction that the jury should not consider whether the subpoenaed documents "were actually in existence or under the possession or control of the defendant" (R. 67) did not create a "conclusive presumption" of "existence and possession." The instruction merely reflected the fact that the government's proof had established a prima facie case of wilful refusal to produce, and that petitioner had not offered any evidence or justification at the trial. In these circumstances, the court properly ruled that there was no factual issue as to existence or possession to be resolved by the jury.

> Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof. * * *

See, also, *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 553; *Brown* v. *United States*, 276 U.S. 134, 144.

Such a shifting of the burden of proof of explanation to the defendant is an established principle of criminal law. As Mr. Justice Cardozo, speaking for a unanimous court in *Morrison* v. *California*, 291 U.S. 82, 88–89, explained:

> * * * The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the

> defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. * * *

In the instant case, the government's evidence "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation" (*Morrison, supra*). Here, as in *United States* v. *Fleischman*, 339 U.S. 349, 362–363 (emphasis added), "the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as [he] was able. * * *. On the other hand, the burden of the affirmative was not an oppressive one for [petitioner] to undertake; *the relevant facts are peculiarly within* [*his*] *knowledge.*" Since petitioner failed to produce any evidence to justify his refusal to produce, the court was fully warranted in submitting the case to the jury, and the jury in convicting, upon the prima facie evidence of wilful refusal that the government had introduced. Cf. *Rossi* v. *United States*, 289 U.S. 89.[6]

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[6] In *Rossi*, this Court upheld convictions of operating a still without registration or bond. The prosecution showed that the defendants had custody and control of the still, but did not introduce "affirmative evidence of failure to register the still or to give bond * * *" (p. 90). The Court "agreed" with the government's contention that "in such circumstances the burden of proof to show execution of the bond and registration of the still rested upon the petitioners; that having

II

PETITIONER'S FAILURE TO RAISE BEFORE THE SUBCOMMITTEE ANY QUESTION WITH RESPECT TO THE BREADTH OF THE SUBPOENA AND THE PERTINENCY OF THE SUBPOENAED MATERIALS PRECLUDED HIM FROM RAISING THOSE ISSUES AS A DEFENSE IN HIS CONTEMPT TRIAL

Petitioner contends (Br. 21–28) that the subpoena was "so broad as to constitute an unconsfitutional search and seizure". (Br. 22), and that the evidence is insufficient to support the trial court's ruling that the subpoenaed materials were pertinent to the Subcommittee's inquiry.[7] Although we believe that these contentions are without merit (see Point III, *infra*, pp. 32–37), we think they are further subject to the threshold objection that petitioner's failure to raise them before the Subcommittee precluded him from urging them as a defense in his contempt trial.

The considerations relied upon in *United States* v. *Bryan*, 339 U.S. 323, for holding that a witness's failure to urge before the Committee the absence of a quorum precluded her from raising that issue in

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failed to sustain this, the Judge properly declared them guilty as charged" (pp. 90–91). It stated (pp. 91–92): "The general principle, and we think the correct one * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control."

[7] As petitioner recognized in the district court (R. 59), the question whether the subpoenaed documents were pertinent to the inquiry was for the judge, not the jury, to decide. *Sinclair* v. *United States*, 279 U.S. 263, 298; *Keeney* v. *United States*, 218 F. 2d 843, 845, 846, 849 (C.A. D.C.).

her contempt trial (*supra*, pp. 20–22), are equally applicable to the defenses that petitioner here sought to raise for the first time at his trial. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653–654. For here, just as in *Bryan*, if petitioner believed that the alleged undue breadth of the subpoena and nonpertinency of the subpoenaed records were "legitimate reasons for failing to produce the records * * * a decent respect for the House of Representatives * * * would have required that [he] state [his] reasons for noncompliance upon the return of the writ" (339 U.S. at 332). Had he done so, the "defect" in the scope of the subpoena, "if any, was one which could easily have been remedied" (339 U.S. at 333). For if it were unduly broad, it could then have been appropriately modified. Cf. *Morton Salt, supra.* Similarly, if petitioner had challenged before the Subcommittee the pertinency of the material sought, its relevancy could then and there been explained to him or, if some of the subpoenaed materials were shown to be unrelated to the inquiry, they could have been excluded. Thus, the effect of petitioner's failure to raise these issues before the Subcommittee is that "the Committee's investigation was obstructed by an objection which, so far as we are informed, could have been rectified in a few minutes" (*Bryan*, 339 U.S. at 333).

The necessity that a witness specifically raise before the Committee any objection as to pertinency (and, by the same reasoning, as to scope) is clearly shown, we believe, by a comparison of this Court's decisions in *Watkins* v. *United States*, 354 U.S. 178

and *Barenblatt* v. *United States*, 360 U.S. 109. In *Watkins*, where this Court set aside a contempt-of-Congress conviction on the ground that the pertinency of questions put to the witness by the House Un-American Activities Subcommittee had not been adequately explained, the Court stated (354 U.S. at 214–215, emphasis added) that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency*, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto." The Court further noted (p. 214) that there the witness "objected to the questions on the grounds of lack of pertinency."

In *Barenblatt*, where a contempt conviction based on a refusal to testify before the same Committee was upheld, the Court stated (360 U.S. at 123) that "the factors which led us to rest decision on this ground [of pertinency] in *Watkins* were very different from those involved here." It pointed out (*ibid.*) that although in *Watkins* "the petitioner had made specific objection to the Subcommittee's questions on the ground of pertinency", "[i]n contrast, petitioner in the case before us raised no objections on the ground of pertinency at the time any of the questions were put to him."

Bryan indicates another reason why petitioner's failure to raise the issues before the Subcommittee precluded him from raising them at the trial. Here, as in *Bryan*, he "does not deny, and the transcript of the hearing makes it perfectly clear, that [he] would

not have complied with the subpoena * * * no matter how" (339 U.S. at 333–334) its scope had been reduced or in how much detail the Subcommittee had explained the pertinency of the records. Thus, "the fact that the alleged defect upon which [petitioner] now insists is, in [his] own estimation, an immaterial one, is clearly shown by [his] reliance before the Committee upon other grounds for failing to produce the records" (339 U.S. at 333), namely, a claim of privilege with respect to any questions as to their possession of control, coupled with an unexplained flat refusal to produce them.

III

IN ANY EVENT, THE SUBPOENA WAS NOT UNDULY BROAD AND THE EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT THE SUBPOENAED DOCUMENTS WERE PERTINENT TO THE INQUIRY

A. The subpoena was not so broad as to constitute an unreasonable search and seizure

The subpoena directed petitioner to produce "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) "the organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by" it (R. 6). We submit that this demand was not unduly broad.

"[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209). The Subcommittee's inquiry here was a relatively broad

one—whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26)—and the permissible scope of materials that could be sought was, therefore, also relatively broad.

Since the Subcommittee could not know precisely what books and records were kept by the Civil Rights Congress, the subpoena necessarily could only "specif[y] * * * with reasonable particularity, the subjects to which the documents * * * relate." *Brown* v. *United States*, 276 U.S. 134, 143. The demand for "all records, correspondence and memoranda" of the Civil Rights Congress relating to the three specified subjects described them "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 210, n. 48. "[T]he description contained in the subpoena was sufficient to enable * * * [petitioner] to know what particular documents were required and to select them accordingly." *Brown* v. *United States*, *supra*. If petitioner had any doubt as to what was required, or could have shown that compliance was unduly burdensome or that the material sought was unrelated to the inquiry, he could—and should—have so advised the Subcommittee. See *supra*, pp. 29–32.

The subpoena in this case is no more sweeping than several that this Court has sustained against the challenge of undue breadth. Thus, in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, this Court upheld an administrative subpoena which called for production of "[a]ll time cards, time books, employees' wage

statements and pay-roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation" in specified "factories or departments" and for specified periods ranging from 3 to 23 months (Record, No. 142, October Term, 1942, pp. 8–9).

Similarly, in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 209, the subpoena, which this Court upheld on the ground that "the documents sought are relevant to the inquiry," called for the production of

> All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof [October 14, 1943 (Record, No. 61, October Term, 1945, p. 11)], including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods [p. 210, note 46].

See, also, the broad subpoena upheld in *Civil Aeronautics Board* v. *Hermann,* 353 U.S. 322 (Record, No. 540, October Term, 1956, pp. 39–60). The courts of appeals have upheld subpoenas of comparable sweep.[8]

[8] E.g., *Smith* v. *Porter,* 158 F. 2d 372 (C.A. 9), certiorari denied, 331 U.S. 816 ("[A]ll of the financial accounting, cost and other records, including but not limited to" specified cate-

The foregoing cases involved subpoenas issued by administrative officials or agencies. The instant subpoena, issued by a Congressional Committee, possessed of broader investigative powers, is, *a fortiori*, of permissible scope.[9]

Furthermore, since, as we shall now show, the material sought was pertinent to the Subcommittee's inquiry, the subpoena necessarily was not unreasonably broad. Petitioner's constitutional argument thus fails, since compulsory compliance with a reasonable subpoena *duces tecum* does not violate the Fourth Amendment. *Hale* v. *Henkel*, 201 U.S. 43, 76; *Wil-*

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gories); *Westside Ford* v. *United States*, 206 F. 2d 627 (C.A. 9) (various specified documents described by the court (p. 629) as "the documents relating to all sales of new automobiles and services performed thereon" during a specified period); *Shotkin* v. *Nelson*, 146 F. 2d 402, 404 (C.A. 10) ("all sales invoices, purchase orders, preference rating records, accounts receivable, notes receivable, bookkeeping journals and general ledgers, and all inventories taken in 1943 * * * showing the purchase, ownership and sale of electrical and light fixtures and supplies by you and by all and any of the companies * * * named, during the years 1943 and 1944").

[9] Petitioner contends (Br. 22) that the subpoena is "limitless as to time." This alleged defect, however, is more apparent than real. For, as petitioner himself states (*id.*, n. 7), the subpoena actually covers only the six-year period between the organization of the Civil Rights Congress in 1946 (see the report (p. 4) of the Subversive Activities Control Board in *Brownell* v. *Civil Rights Congress*, Docket No. 106-53, July 26, 1957, petition to review pending *sub nom. Civil Rights Congress* v. *Subversive Activities Control Board*, C.A. D.C., No. 14, 136), and February 1952. Plainly, this is "a reasonable period of time" (*Brown* v. *United States*, 276 U.S. 134, 143). See the subpoena upheld in the *Oklahoma Press* case, *supra*, which covered extensive records for a five-year period.

son v. *United States*, 221 U.S. 361, 376; *Oklahoma Press* case, *supra*, pp. 195–196, 208–209.

B. The subpoenaed documents were pertinent to the Subcommittee's inquiry

The purposes of the Subcommittee's investigation were to determine whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26). At the previous hearings, the Committee had received information about "a concentration of Communist effort in certain defense areas of the country," and had learned that party members "employed in industry" were used "to keep the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in the area where they worked (R. 25). The Committee also had reason to believe that the Civil Rights Congress was a subversive organization (R. 17, 22, 45, 48–49).

We submit that this evidence warranted the trial court's ruling that the subpoenaed records of the Civil Rights Congress "were pertinent to the particular investigation" (R. 57). The circumstances and auspices under which the Civil Rights Congress was organized, the identity and terms of affiliation with other organizations, and the sources of its funds and to whom they were distributed, were all highly significant in determining whether the organization was being used by the Communists in the Detroit area. If, for example, the Civil Rights Congress had close affiliation with known or suspected Communist organizations, or if its funds had been received from such organizations

of were being used to support Communist activities in the area, these facts would be highly pertinent to the Subcommittee's inquiry—both of themselves and as possible sources of, and links to, other pertinent evidence.

In sum, the documents called for by the subpoena were not "plainly incompetent or irrelevant to any lawful purpose of the [Subcommittee] in the discharge of [its] duties" (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509), but, on the contrary, were clearly "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209; see *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 554). No more is required to satisfy the standard of 2 U.S.C. 192, which authorizes the Congress to require production of papers in "any matter under inquiry before * * * any committee of either House * * *."

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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